

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEBORAH ANN PADILLA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12992
Trial Court No. 4FA-16-01426 CR

MEMORANDUM OPINION

No. 6858 — February 5, 2020

Appeal from the District Court, Fourth Judicial District,
Fairbanks, Ben A. Seekins, Judge.

Appearances: Kenneth L. Covell, Law Office of Kenneth L.
Covell, Fairbanks, for the Appellant. Patricia L. Haines,
Assistant Attorney General, Office of Criminal Appeals,
Anchorage, and Kevin G. Clarkson, Attorney General, Juneau,
for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,
Judges.

Judge HARBISON.

Following a jury trial, Deborah Ann Padilla was convicted of driving under the influence.¹ Padilla appeals her conviction, arguing that a comment by the trial judge

¹ See AS 28.35.030(a)(1).

during her attorney's closing argument deprived her of a fair trial. For the reasons we explain in this opinion, we conclude that the judge's remark properly corrected an argument that was contrary to established law and did not deprive Padilla of a fair trial.

An important part of the State's case against Padilla was the breath test result showing that her breath alcohol concentration was over the legal limit. During the trial, the State offered two verification of calibration reports to establish that the breath test instrument was calibrated as required by the controlling regulation, 13 AAC 63.100(c).

Each of the verification of calibration reports included a sworn statement by the Scientific Director of the State Breath Alcohol Program. This statement read:

- (1) I am a Forensic Scientist IV at the State of Alaska Scientific Crime Detection Laboratory.
- (2) The Alaska Scientific Crime Detection Laboratory is an entity within the Department of Public Safety.
- (3) I am the Scientific Director of the State Breath Alcohol Program.
- (4) In that capacity, I am responsible for overseeing the Breath Alcohol Program, which includes assuring that instruments are calibrated and maintaining program records.
- (5) The above is a true and accurate verification of calibration, which is performed by the instrument's software, as specified by the State Breath Alcohol Program. Verification of calibration is a regularly conducted and regularly recorded activity of the State Breath Alcohol Program.
- (6) The referenced instrument is certified for evidentiary use in the State of Alaska.

Padilla's attorney objected to the admission of the verification of calibration reports. The attorney noted that 13 AAC 63.100(c) provides that the verification of calibration "must be performed by the scientific director or by a qualified person

designated by the scientific director.”² He argued that because the calibration reports showed that they were conducted by instrument software rather than by “a person,” they were inadmissible. Noting that it had rejected this argument in previous cases, the trial court overruled the objection and permitted the State to introduce the calibration reports into evidence. Padilla’s attorney noted for the record that the relevant case was *Dennis v. State, Dep’t of Admin., Div. Of Motor Vehicles*.³

In *Dennis*, the Alaska Supreme Court held that the requirement under 13 AAC 63.100(c) that the verification of calibration be performed “by the scientific director or by a qualified person designated by the scientific director” is satisfied if the scientific director programs the instrument’s software, causing the verification of calibration to be automatically initiated at regular intervals and the test results to be automatically sent to the crime lab.⁴ In reaching this conclusion, the supreme court noted that, where no contrary evidence is produced, “the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.”⁵ The supreme court held that “[t]his presumption and the facts certified in the verification report support . . . the conclusion that the scientific director performed th[e] verification” as required by the regulation.⁶

² 13 AAC 63.100(c).

³ *Dennis v. State, Dep’t of Admin., Div. of Motor Vehicles*, 320 P.3d 1150 (Alaska 2014).

⁴ *Id.* at 1152.

⁵ *Id.* at 1152 n.6 (citing *Wallace v. State*, 933 P.2d 1157, 1162 (Alaska 1997)).

⁶ *Id.* at 1152.

The facts certified in the verification reports in Padilla’s case are identical to those referred to by the supreme court in *Dennis*.⁷ And Padilla’s attorney did not present any evidence that the scientific director did not properly discharge his official duties.⁸

Despite the trial court’s ruling, Padilla’s attorney argued in closing that the breath test instrument’s calibration must be verified by “a person” rather than by the software in order to comply with the controlling regulation. The attorney argued that because the verification of calibration was done by the instrument software, the breath test result was invalid. At that point, the trial court interrupted the attorney’s argument to explain that it had reached a legal conclusion that the verification of calibration “satisfies the requirement of being performed by a person.”

Padilla’s attorney then moved for a judgment of acquittal, and later for a mistrial, arguing that he was “hamstrung” by the court’s interruption because the court directly commented on an essential factual issue. The court denied these motions.

On appeal, Padilla asserts that the judge’s comment was tantamount to taking judicial notice of an essential fact that must be proved to the jury, and that it accordingly constitutes reversible error.

But the record shows that the judge did not make a finding of fact. Instead, the judge clarified a point of law that the defense attorney was misrepresenting to the jury. Therefore, the judge did not commit reversible error when he interrupted the defense attorney’s closing to correct the attorney’s misstatement.

Padilla argues that, notwithstanding the holding in *Dennis*, a defendant may still attack the breath test result by pointing out to the jury any weaknesses in that

⁷ *Id.* at 1150-51.

⁸ *See id.* at 1152.

foundation or in the administration of the test.⁹ But that is not what Padilla's attorney was doing when the judge interrupted his closing argument. Instead, Padilla's attorney was attempting to argue that if the verification of calibration is performed by the instrument's software, the breath test is not performed in substantial compliance with the controlling regulation, even though the verification of calibration was automatically initiated at regular intervals by the machine's software and the results were automatically sent to the crime lab. That argument was incorrect as a matter of law, and the trial court did not err by correcting Padilla's attorney.

The judgment of the district court is AFFIRMED.

⁹ See *Lawrence v. State*, 715 P.2d 1213, 1217 (Alaska App. 1986).